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Nos. 85-1910 and 85-2094

In the Supreme Court of the United States

OCTOBER TERM, 1986

BUSINESS ELECTRONICS CORPORATION, PETITIONER

v.

SHARP ELECTRONICS CORPORATION

SHARP ELECTRONICS CORPORATION, CROSS-PETITIONER

v.

BUSINESS ELECTRONICS CORPORATION

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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SUPPLEMENTAL BRIEF FOR RESPONDENT/ CROSS-PETITIONER PURSUANT TO RULE 22.6

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On May 13, 1987, the United States filed a brief *amicus curiae* in which it (a) recommended that the Court deny the petition, despite a conflict in the circuits on the question of how to define vertical price fixing in the dealer termination context, because of the "strong trend toward adoption of the rule espoused by the court below" (U.S. Br. 12); and (b) expressed no views on whether the Court should grant the cross-petition, which raises the question

of whether vertical price restraints should be subject to the rule of reason, because the statute appropriating funds for the operation of the Department of Justice prohibits the Solicitor General from undertaking any activity to alter the *per se* prohibition on resale price maintenance. U.S. Br. 15.

Respondent/Cross-Petitioner Sharp Electronics Corporation ("Sharp") respectfully submits that certiorari should be granted notwithstanding the government's peculiar submission.

1. With respect to the petition, the essence of the government's position is that the appropriate definition of vertical price fixing was resolved by *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U.S. 752 (1984). The government maintains that under *Monsanto*, an agreement on prices is a necessary element of a vertical price fixing case, that the Fifth Circuit's decision shows that the courts of appeals understand this rule and will follow it in the future, and that any need for granting the petition is therefore obviated. U.S. Br. 12. Contrary to the government's assertions, however, the question raised by the petition was the subject of a split among the circuits prior to *Monsanto*, remains the subject of a conflict, and (for both legal and practical reasons) urgently requires resolution by this Court.

While Sharp agrees that *Monsanto* requires proof of an actual price fixing agreement before *per se* liability attaches, the decision below does not reflect an application of *Monsanto* as such. Rather, the Fifth Circuit made plain that its decision was the product of pre-*Monsanto* precedent from within the Fifth Circuit. See Pet. App. 7a-9a. While the court of appeals read *Monsanto* as being consistent with the prior rule in the Fifth Circuit (*id.* at 9a-10a), it expressly acknowledged that it would be perfectly proper to read *Monsanto* the other way, *i.e.*, as consistent with decisions such as *Cernuto, Inc.* v. *United Cabinet Corp.*, 595 F.2d 164 (3d Cir. 1979). Pet. App. 11a-12a.

Therefore, as new dealer termination cases arise outside the Fifth Circuit, the decision below can be cited for the proposition that *whatever* rule existed in the circuit prior to *Monsanto*, that rule should continue to be followed. Since most circuits that had considered the matter pre-*Monsanto* followed the *Cernuto* rule, see Pet. App. 8a, the decision below can be cited in support of adhering to that rule post-*Monsanto*. Thus, in *O.S.C. Corp. v. Apple Computer, Inc.*, 792 F.2d 1464 (9th Cir. 1986), the Ninth Circuit relied on its pre-*Monsanto* decision in *Zidell Explorations, Inc.* v. *Conval International, Ltd.*, 719 F.2d 1465 (9th Cir. 1983)—a case that expressly adopted the *Cernuto* standard—as setting forth the law in that Circuit on what constitutes vertical price fixing. 792 F.2d at 1467.

The government's contentions that there no longer is a split among the circuits and that the rule adopted by the Fifth Circuit has met with unanimous approval are demonstrably erroneous. Subsequent to *Monsanto*, the rule announced below was squarely rejected in *Victorian House Inc.* v. *Fisher Camuto Corp.*, 769 F.2d 466 (8th Cir. 1985), which held:

> A conspiracy between a wholesaler and one or more of its retailers to terminate a competing retailer on the basis of price constitutes a *per se* violation of the Sherman Act. *Cernuto Corp.* v. *United Cabinet Corp.*, 595 F.2d 164, 170 (3d Cir. 1979).

769 F.2d at 469. The government suggests that the *Victorian House* decision can largely be ignored. U.S. Br. 12. But companies such as Sharp, which may be named as defendants in antitrust actions in locations such as Minneapolis or St. Louis, cannot be so sanguine (or foolhardy).

Moreover, the government fails to point out that the Fifth Circuit's decision in this case has also been severely criticized by commentators:

> The Fifth Circuit's decision in *Business Electronics Corp.* badly distorted the *Monsanto* analysis. The *Monsanto* Court nowhere required that a plaintiff prove the existence of a *contract* between the supplier and the complaining dealer to maintain prices "at some level" resulting in the price-cutting dealer's termination before allowing a jury to find illegal price fixing.

Flynn, *The "Is" And "Ought" of Vertical Restraints After Monsanto Co. v. Spray-Rite Service Corp.*, 71 Corn. L. Rev. 1095, 1114 (1986) (emphasis in original).

Indeed, the government's suggestion that there is unanimity of any kind in this area will come as a surprise to the antitrust bar. To the contrary, if a supplier such as Sharp were to terminate a free riding dealer such as BEC in response to an "it's him or me" ultimatum from another dealer, the outcome of any resulting antitrust action would depend entirely upon the venue of the suit. In the Eighth Circuit the supplier would have engaged in a *per se* illegal price fixing agreement (*Victorian House*), in the Fifth Circuit there would be a jury question whether there was a *per se* illegal price fixing agreement (*Business Electronics Corp.*), and in the Fourth Circuit the supplier would prevail on summary judgment because a response to an "it's him or me" ultimatum is not deemed an agreement at all. See *Garment District, Inc.* v. *Bulk Stores Services, Inc.*, 799 F.2d 905, 909, 911 (4th Cir. 1986). This hardly reflects unanimity.

The third fundamental fallacy in the government's position is that its optimistic prediction as to the future trend of the law is of little real world utility. Sharp has dealers in every circuit. If Sharp wants to terminate its dealer in Pittsburgh and that dealer happens to be a discounter, Sharp finds itself in a quandary. Pittsburgh is in the Third Circuit, the Third Circuit decided *Cernuto*, and *Cernuto* makes any termination of a discounter an invitation to a lengthy and expensive antitrust suit. Sharp's problem is no less pronounced if the dealer in question is in Boston. The First Circuit has not yet spoken on the issue of what constitutes vertical price fixing. The only guidance counsel could offer would be the assurance that, in the sincere belief of the Solicitor General, the conflict "has largely abated," several circuits "appear to have" abandoned their prior positions, and the First Circuit "may well conclude" that the decision below, rather than the *Cernuto* rule, should be followed. U.S. Br. 12, 13. In making this observation, counsel would have to add that the First Circuit also "may well conclude" exactly the opposite, and that if the First Circuit follows *Cernuto* and the several other circuits that agree with *Cernuto*, Sharp can expect to write a check for treble damages.[1]

In sum, with the present confused state of the law, Sharp and every other national supplier must play Russian roulette when they terminate a dealer. It is for this reason that Sharp, although it prevailed below, does not oppose the petition and respectfully disagrees with the views expressed by the government with respect to the petition.

2. Despite the Court's invitation, the government's brief expresses no views with respect to the cross-petition. This decision was based solely upon the appropriations rider, which prohibits the Department of Justice from "engaging in activity to alter the *per se* prohibition on resale price maintenance . . . ." U.S. Br. 15. That stat-

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[1] The carefully crafted, precatory nature of the government's assurances on this critical issue illustrates the wisdom of Judge Jones' observation, concurring below, that "[s]emantic nuances are costly to businessmen in the real world." Pet. App. 22a.

ute, of course, did not preclude the Solicitor General from saying (a) that certiorari should be denied because the issue is not certworthy, or (b) that should certiorari be granted, the *per se* prohibition on vertical price fixing ought to be confirmed by the Court. Since the government said neither of these things, there can be little doubt as to the position the government would have taken on the cross-petition but for the appropriations rider.

This is particularly evident because the United States is already firmly on record as supporting review and reversal of the *per se* rule against resale price maintenance. In 1983, as *amicus curiae* in *Monsanto*, the United States urged this Court to "grant review . . . to consider whether *all* vertical restrictions, including resale price maintenance, should be analyzed under the rule of reason." [2] Brief for the United States as Amicus Curiae on Petition for a Writ of Certiorari at 13 (emphasis in original). It did so even though none of the parties in *Monsanto* had raised the issue at trial, or on appeal, or before this Court. The United States believed that review was appropriate notwithstanding the failure of the parties to preserve or present the issue, because the question was of such overarching importance and the application of the *per se* rule to vertical price restraints was so ill advised. *Id.* at 13-17.

It is equally clear that the government's views have not changed since *Monsanto*. On April 23, 1987, in testi-

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[2] The government's brief in support of the petition in *Monsanto* also noted:

> [T]he similarities in purpose and effect between resale price maintenance and non-price vertical restrictions led Justice White to observe in his concurring opinion in *Sylvania* that the "effect * * * of the Court's opinion is necessarily to call into question" the per se rule against the resale price maintenance. 433 U.S. at 70.

Brief for the United States as Amicus Curiae on Petition for a Writ of Certiorari at 15 n.22.

mony before the Subcommittee on Antitrust, Monopoly and Business Rights of the Senate Judiciary Committee, Acting Assistant Attorney General Charles F. Rule delivered as ringing an endorsement of Sharp's position as words allow:

> The Department of Justice filed a brief as amicus curiae in the *Monsanto* case expressing serious doubts as to the continued legitimacy of the current per se rule. We invited the Supreme Court to reexamine the rule, urging that resale price maintenance usually will not be used by a manufacturer simply to increase the retail price of its product, since it can do that more directly by raising its wholesale price. Rather, resale price maintenance usually will be designed to promote interbrand competition by encouraging dealers, *inter alia*, to train sellers, to undertake effective sales promotions, to create attractive showrooms, and to support informational, maintenance or repair services. Resale price maintenance curtails "free rider" dealers, who sell at discount prices to customers attracted to a product by other dealers' advertising or other promotional activities and who thus thwart procompetitive efforts desired by the manufacturer. Economists have posited several other procompetitive explanations of resale price maintenance as well.
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> * * * *
>
> For the reasons articulated in our *Monsanto* brief, we view resale price maintenance agreements as potentially procompetitive—not just competitively neutral—in many circumstances.

Rule testimony at 6-7.

The specific statements made by the United States in *Monsanto* are worth repeating, both because these views were set forth prior to the interdiction of the appropriations statute and because Acting Assistant Attorney General Rule has confirmed that these views have not changed:

> [T]he logic of *Sylvania* compels the conclusion that resale price maintenance—like other vertical restrictions—is unsuitable for per se treatment.
>
> * * * *
>
> This Court has always regarded the rule of reason as the normal test of the legality of an alleged restraint: per se rules are invoked only where economic and judicial experience have shown that certain practices invariably have a "pernicious effect on competition" and lack "any redeeming [competitive] virtue." *Sylvania*, *supra*, 433 U.S. at 49-50; . . . . Accordingly, a per se rule against resale price maintenance can be justified only if there is some persuasive basis for supposing that the practice reduces output, retards innovation, or otherwise interferes with Sherman Act goals. But the Court has never analyzed resale price maintenance in terms of its actual economic effects, much less found that those effects are so necessarily anticompetitive as to justify a per se ban. Such an analysis would show that resale price maintenance, like the non-price vertical restrictions in *Sylvania*, can have significant procompetitive effects.

Brief for the United States as Amicus Curiae at 19, 20-21 (footnote omitted).

Other representatives of the government, when unfettered by the restrictions of the appropriations statute, have been equally emphatic in support of Sharp's position. Chairman Oliver of the Federal Trade Commission publicly stated that application of the rule holding vertical price restraints *per se* injurious to competition reflects an "ancient myth" that has been thoroughly debunked as a matter of economic doctrine. He further suggested that this case is the appropriate vehicle for this Court to resolve whether the *per se* rule should be eliminated in the vertical context. D. Oliver, Address to the Antitrust Law Section of the American Bar Association (Aug. 12, 1986), reprinted in 5 Trade Reg. Rep. (CCH) ¶ 50,481 at 56,287-88.

The continuity of the government's views over the four years since they were first espoused in *Monsanto* is hardly surprising. The proper treatment of vertical price fixing is the principal unresolved antitrust question of the day, and judicial and economic experience since *Monsanto* amply confirms the government's conclusion that the rule of reason, rather than the *per se* rule, is the appropriate standard of analysis. See authorities cited at Cross-Pet. 6-8. The government's unwillingness to address the issue, even in response to this Court's invitation, should be taken for what it obviously is: an acknowledgment that were it free to speak, it would again urge this Court to review the question of whether vertical price restraints should be subject to the *per se* rule, and then, on the merits, to resolve that question in the negative.[3]

3. Although Sharp believes that the proper treatment of vertical price restraints is so important that it would be appropriate to grant the cross-petition even if the petition were not deemed substantial, see *Snepp* v. *United*

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[3] The only reason offered by the government why certiorari might not be warranted is that this case is "interlocutory." See U.S. Br. 6 & n.7, 14. This contention is incorrect. No further proceedings would be required on remand if this Court either granted the petition and agreed with BEC's submission or granted the cross-petition and agreed with Sharp's submission. In the first instance, the judgment entered on the jury's verdict would simply be reinstated. In the latter instance, the complaint would have to be dismissed because BEC never sought to proceed below under a rule of reason theory and no such claim could have been established on this record. See Cross-Pet. 3-4.

In any event, even if the government's contention were correct, that would not be a reason to deny review here. This Court has not hesitated to grant review of important and unresolved antitrust issues, even though the judgment below was interlocutory. See, *e.g.*, *Matsushita Electric Industrial Co.* v. *Zeneth Radio Corp.*, 106 S.Ct. 1348 (1986). As we explain in the text, it is essential that the business community know the rules governing vertical price restraints. Nothing that can occur on remand in this case can dispel the current confusion on that issue.

States, 444 U.S. 507, 524-25 (1980) (Stevens, J., dissenting), both the petition and the cross-petition present questions that plainly are "certworthy" under the traditional standards applied by this Court. These questions are frequently recurring ones of immense practical importance on which there exists a direct conflict among the circuits. The legal issues are well-focused, and they have been properly preserved for this Court's review. Finally, the record in this case presents all of the factual and economic information needed to support an in-depth analysis by the Court.

Accordingly, certiorari should be granted to review the questions presented by the petition and cross-petition.

Respectfully submitted.

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